1992

Howard F. Hatch, Marjorie S. Hatch, and University Ave Development Associates v. Zions First National Bank, Dwane J. Sykes, Virginia Flynn, and William Christiansen d/b/a Arapian Valley Livestock; Dwane J. Sykes and Patricia Sykes v. Anthony Ragozzine and Ruth Ragozzine : Brief of Appellee

Utah Court of Appeals

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Howard F. Hatch; Appellant Pro Se.

IN THE UTAH COURT OF APPEALS
STATE OF UTAH

HOWARD F HATCH, MARJORIE S. HATCH, and UNIVERSITY AVE DEVELOPMENT ASSOCIATES, a limited partnership,

Appellant Plaintiffs ,

vs.

ZIONS FIRST NATIONAL BANK, DWANE J.SYKES, VIRGINIA FLYNN, and WILLIAM CHRISTIANSEN d/b/a ARAPIAN VALLEY LIVESTOCK CO.,

Appellee Defendants

DWANE J. SYKES and PATRICIA SYKES

Appellants Plaintiffs

vs.

ANTHONY RAGOZZINE and RUTH RAGOZZINE

Appellees Defendants

APPELLEE BRIEF FOR WILLIAM CHRISTIANSEN AND DWANE SYKES

CASE # 920437-CA

DATE: 30 SEPTEMBER 1992

ARGUMENT PRIORITY 16

APPEAL FROM THE SUMMARY DISMISSAL OF THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
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JURISDICTION

Under Rule 42(a) U.R.A.P. the Utah Court of Appeals has jurisdiction over cases transferred from the Utah Supreme Court to the Utah Court of Appeals.

Under Rule 3 U.R.A.P. the Utah Supreme Court has jurisdiction over a final order from a District Court. Such is the case here.

ISSUES

1. Did the trial court err in dismissing the Appellee Christiansen where the court determined that there were no outstanding causes of action against Mr. Christiansen.

2. Did the trial court err in dismissing the Appellee Sykes where the court determined that there were no outstanding causes of action against Mr. Sykes.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES & REGULATIONS

None at issue

FACTS

The original case was filed by Mr. Hatch et. al. on May 9 1983. The principal claims by Mr. Hatch are:

1) They were the owners of a piece of land that was about to be sold at trustee sale.

2) Virginia Flynn had agreed to rescue the Mr. Hatch from the sale.

3) Mr Sykes, Zions Bank and Zions Bank's attorney scared her off by claiming that a lawsuit was possible and imminent.

4) The land was sold at trustee sale.

5) Mr. Christiansen bought the property on behalf of Mr. Sykes.

The case has been off and on for the years due to the antipathy of the litigants and the fact that Mr. Hatch and some of his alter egos have been in and out of bankruptcy several times during the period. The three cases were all consolidated since they had some basis in the same issues and facts. The root cause of the controversy is a piece of property in Provo which Mr. Sykes and Mr. Hatch both claimed to own. Both Mr. Sykes and Mr. Hatch claim that

many evil deeds were perpetrated by the other.

Mr. Sykes claims that Mr. Hatch contracted to sell him the property and since reneged on the deal. Mr. Hatch claims that because of Mr. Sykes vigorous pursuit of his claim to the property a person willing to loan money on the property was scared off. Mr. Hatch claims that the money would have saved the property from foreclosure by Zions Bank.

The money was not loaned to Mr. Hatch and therefore the property foreclosed on and sold to Mr. Christiansen at a sheriffs sale.

Mr. Hatch filed suit against Mr. Sykes, Zions Bank, Mr. Christiansen and Zions Bank's lawyers. Mr. Hatch settled its problems with Zions and Zions lawyers for a cash payment. Due to settlement and the affirmation of the sheriff's sale Mr. Christiansen was dismissed from the suit on his motion. On separate motion, all claims against Mr. Sykes were also dismissed after the trial court determined that, with no claim on the property Mr. Hatch no longer had a cause of action against Mr. Sykes. Mr. Sykes counterclaims against Mr. Hatch and the Ragozzines were also dismissed for failure to prosecute.

SUMMARY OF ARGUMENTS

Slander of title requires that Mr. Hatch have some interest in the property. There is no interest in the property due to the sale of the property and subsequent affirmation of the sale.

With the settlement of the property question with Zions Bank there are no longer any prayers for relief that are valid.

The elements of fraud were not even alleged in the complaint so no fraud could possibly exist.

There is no responsibility on the part of the court to create the legal arguments and theories under which Mr. Hatch may recover. After almost 10 years of litigation, Plaintiff should know what he is suing for and why without the assistance of the court.

ARGUMENT

The lower court held that the claims of Mr. Hatch et al must be dismissed based upon two independent grounds. The lower court stated that the slander of title action could not be maintained, given that Mr. Hatch no longer had an interest in the property in question; and that even if he had such an interest, the complaint no longer stated a relief which could be granted.

The second tier of the lowers court's decision revolves around the undisputed fact that only prayers for relief 3 and 4 and possibly 5 were still valid. These prayers read:

> **3. for punitive damages against defendant Zion's and Sykes of $450,000 for willful and malicious conduct in connection with the transaction which is the subject of this complaint;**
>
> **4. for actual damages of $150,000 in the event the property is lost by the plaintiffs through the actions of the defendants;**
>
> **5. and the costs of this action, including a reasonable attorney's fee together with such relief as the court may deem just and proper.**

Mr. Hatch in attempting to obtain summary disposition in reversing the lower court's decision has proposed a series of arguments:

SLANDER OF TITLE REQUIRES SOME INTEREST IN THE PROPERTY

First, Mr. Hatch claims that the lower court was wrong in its

holding that a slander of title requires that Mr. Hatch hold some interest in the property.

The prevailing rule is and has been that where a party does not have an interest in the property slandered he has no standing to sue. The fact of a past interest is not sufficient to create such standing. In Bennett v Pace, 731 P.2d 33 (Wyo 1987) a similar situation to the instant case was decided. In that case a contractor placed a mechanic's lien on the property of the plaintiff. The plaintiff subsequently sold the property and then brought suit against the contractor for slander of title in placing the lien. The Supreme Court of Wyoming ruled that the plaintiff had no standing to file such a suit since they no longer had an interest in the property.

Such is the case here. In this case the lawsuit was filed after the property had been foreclosed and subsequently sold. At the time of the filing of the lawsuit Mr. Hatch did not have an interest in the property. Therefore he had no standing to bring a slander of title action.

Even if Mr. Hatch had some claim to the property at the beginning of the suit, Mr. Hatch along with all other plaintiffs during the pendency of the suit settled their claim to the property. In that settlement the plaintiffs (Mr. Hatch) agreed in their stipulation that:

> **Plaintiffs ... agree that the trustee's sale ... was a bona fide, arm's length, non-collusive, valid and binding Trustee's sale. ... Plaintiffs ... waive and abandon any ... claims and defenses ... which ... challenge or dispute the validity ... of the Trustee's Sale or the title of the purchaser at the Trustee's sale.**

If Mr. Hatch had any claim to the property before the settlement, any such claim was subsequently extinguished. Therefore if Mr. Hatch had standing to assert slander of title previous to the settlement, he had no such standing subsequent to it.

It is undisputed that Mr. Hatch has no current interest in the property as required by a slander of title action. Therefore an action for slander of title cannot proceed.

THERE IS NO LONGER A VALID PRAYER FOR RELIEF

Second, Mr. Hatch contends that the court was wrong in ruling that the loss of the property in question was not due to the actions of the defendants.

Neither Mr Christiansen nor Mr. Sykes et al foreclosed on the property. That action was taken by Zion's bank when Mr. Hatch et al failed to make the necessary payments. The property was then sold at trustee's sale, not by Mr. Christiansen nor Mr. Sykes, but at the behest of Zions bank.

Subsequent to the foreclosure and filing of the lawsuit any rights to the property were transferred to Zions bank and subsequent purchasers by the settlement negotiated by Mr. Hatch and the other plaintiffs. Again, neither Mr. Christiansen nor Mr. Sykes had any input or involvement in that settlement.

It is irrational to conclude that the loss of the property was due to the actions of Mr. Christiansen or Mr. Sykes. The actions

precedent to the loss of the property were the result of actions taken by Mr. Hatch et al.

There is therefore no basis to award relief based on prayer for relief #4.

Since punitive damages are derivative in nature, if actual damages cannot be awarded punitive damages likewise cannot be awarded. Therefore prayer #3 is also no longer valid.

Given that there is no longer a prayer that could be granted, there is no longer a set of facts that could lead to relief for the plaintiffs.

THERE WAS NO SET OF FACTS ALLEGED UNDER WHICH RELIEF COULD BE GRANTED

Third, Mr. Hatch's third and fourth arguments can be folded together. Mr. Hatch argues that even if the relief requested in the complaint was no longer valid, the court should have granted Mr. Hatch some unspecified relief to which he was entitled and that the lower court should not have decided the case while a real controversy was outstanding.

Mr. Hatch relies upon Rule 54(c)(1) U.R.C.P. for this interpretation. Mr. Hatch is misusing this rule in as much as this rule grants the court broad discretion in formulating the type of relief that is granted. This is not a rule of compulsion but discretion for the bench. Further this rule does not force the judge to recast the arguments and facts of the case in order to

formulate some legal theory or cause of action under which the Mr. Hatch may recover. It is the burden of Mr. Hatch to carry the burden of producing the theory and arguments that will demonstrate his case, not that of the judge. Mr. Hatch has not carried this burden.

The case was dismissed based upon defendants' motion for a 12(b)(6) dismissal because the pleadings did not state a cause of action under which relief could be granted. A 12(b)(6) motion for dismissal for failure of the pleadings is to be treated as a motion for summary judgement. Such a motion should be granted only where it appears as a certainty that the plaintiff would be entitled to relief under no state of facts which could be proved in support of the claim. See Hughes v. Howsley, 599 P.2d 1250,1252 (Utah 1979).

The pertinent facts of this appeal are not in dispute. The plaintiffs settled their action with Zions Bank and agreed that the trustee sale was valid. The defendants Christiansen and Sykes had no part in that settlement. Likewise, the only involvement of Mr. Christiansen in the subsequent sale was to purchase the property. The defendants were not the cause of the loss of plaintiffs' property. The property was "lost" at trustee's sale and remaining claims were extinguished by the settlement between plaintiffs and Zions bank.

But, even if we must go to the merits of the case, it is still clear that no facts are alleged under which the cause of action could possibly succeed. The plaintiff has alleged two causes of action - fraud and slander of title. As we have seen above, the

slander of title action cannot survive as a matter of law since one of the essential elements (title to the property) is missing.

Likewise fraud or misrepresentation is insufficient grounds for relief in that the essential elements for such an action have not even been alleged.

Mr. Hatch alleges in the cause of action for "Bad Faith and Fraud" that Mr. Christiansen was the

> **"strawman purchaser for ZIONS, who had already entered into an agreement with Defendant Sykes for the sale of the subject premises, and that ZIONS, CHRISTIANSEN and SYKES together conspired to defraud Plaintiffs of their rightful claims to the premises".**

See First Amended Complaint page 7. Since Mr. Christiansen was not in privity of contract with the Plaintiffs nor in any relationship which would require the exercise of good faith, the cause of action for bad faith does not apply to Mr. Christiansen.

Mr. Hatch claims in his third cause of action a right to recover for conspiracy to defraud. Frankly, I have no idea what conspiracy to defraud might mean. Conspiracy is not a recognized tort and is normally seen only in criminal matters in conjunction with a crime. Assuming therefore, that Mr. Hatch is claiming that Mr. Christiansen and/or Mr. Sykes committed a fraud against him, we will explore that possibility.

Mr. Hatch contends that the broad definition of fraud contained in Black's law dictionary is pertinent to the case. But, Black's contains no elements for the prima facia case nor does it explain what an "artifice to defraud" might be. Nor does Mr. Hatch explain how his case might show this to be a fraud under the

Black's definition.

The actual tort of fraud is seen only as encompassed by the tort of intentional misrepresentation which is also known as fraud or deceit. To establish intentional misrepresentation (or fraud) the following elements must be proved:

1. Misrepresentation (made by defendant)
2. Scienter - malice
3. An intent to induce plaintiff's reliance upon the misrepresentation.
4. Causation
5. Justifiable reliance
6. Damages.

The case alleged by Mr. Hatch fails on at least four or these elements. First, there simply was no misrepresentation and no allegation of misrepresentation committed by Mr. Christiansen or Mr. Sykes. Mr. Christiansen did not make any statements to Mr. Hatch which were a false representation of a material past or present fact. Indeed, the only communication alleged between Mr. Christiansen and Mr. Hatch is the presentation of a Lis Pendens to Mr. Christiansen immediately prior to the sale.

Second, there is no allegation of intent to induce the Mr. Hatch's reliance upon a misrepresentation. As we have seen, there is no allegation that any misrepresentation occurred.

Third, there is no causation. Mr. Hatch seeks damages for the loss of his property. The loss of the property was caused by the foreclosure and subsequent sale by Zions. The person who bought the

property (Mr. Christiansen) can not be held responsible for the default of the Plaintiffs.

Fourth, there is no justifiable reliance. First there was no misrepresentation on which to rely. Even if there had been some misrepresentation, there was no reliance upon that misrepresentation that could have caused damages. Even if Mr. Christiansen had claimed himself not to be a purchaser for the benefit of Sykes or Zions and it later came to be shown that Sykes and Zions had induced Mr. Christiansen to buy the property, there was no reliance by Mr. Hatch on such an assertion. The motivation for Mr. Christiansen's purchase of the property is of no consequence to the fact that the property was being sold due to foreclosure. No reliance by Mr. Hatch on the independence, or lack thereof, of Mr. Christiansen could change the essential facts of foreclosure and sale. Reliance on any statement of Mr. Christiansen was not alleged by the Plaintiffs, nor could any such reliance be justifiable.

Hence, fraud or misrepresentation is not alleged in its essential elements. There is therefore no set of facts alleged under which relief could be granted for fraud.

Mr. Hatch wants to have it both ways. He wishes to take the money from Zion's Bank and declare the trustee sale valid, while still claiming as interest in the land and a right to recover from Mr. Christiansen (who merely purchased the property at trustee sale) and Mr. Sykes. Judge Mower correctly decided that by affirming the validity of the trustee sale that the property was

no longer at issue and the Mr. Hatch had no interest in it. Judge Mower also noted that there was no set of facts alleged under which there was a cause of action by Mr. Hatch.

CONCLUSION

There are no facts alleged which could justify the continuation of this lawsuit. There is no prayer for relief which could be granted, since title to the property in question has been settled voluntarily between Mr. Hatch and Zions. Further the essential elements for recovery based on slander of title or fraud either do not exist or have not been alleged.

This vexatious litigation has been going on for more than a decade. If there are insufficient facts at this late date to justify the continued litigation, there never will be. The decision of the trial court to dismiss should be affirmed.

Sam Primavera

Attorney for Defendant Appellee Christiansen

Dwane Sykes

Defendant Appellee pro se

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the within and foregoing documents to be mailed, postage prepaid, this 7 day of Oct, 19 92, to the following:

Howard F. Hatch
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Pleasant Grove, UT 84062

Dwane Sykes
1511 S. Carterville Rd.
Orem, UT 84058

BY: _____